

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Investigation into (1) whether Entergy Nuclear Vermont)
Yankee, LLC, and Entergy Nuclear Operations, Inc.,)
(collectively, "Entergy VY"), should be required to cease)
operations at the Vermont Yankee Nuclear Power)
Station, or take other ameliorative actions, pending)
completion of repairs to stop releases of radionuclides,)
radioactive materials, and, potentially, other non-radioactive) Docket No. 7600
materials into the environment; (2) whether)
good cause exists to modify or revoke the 30 V.S.A .)
§ 231 Certificate of Public Good issued to Entergy VY;)
and (3) whether any penalties should be imposed on)
Entergy VY for any identified violations of Vermont)
statutes or Board orders related to the releases)

**DIRECT BRIEF OF WINDHAM REGIONAL COMMISSION
CONCERNING THE SCOPE AND JURISDICTION
OF THE PUBLIC SERVICE BOARD IN DOCKET 7600**

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Introduction

Windham Regional Commission (WRC) submits this Direct Brief concerning the jurisdiction of the Public Service Board (the Board), as scheduled by Order of the Board on May 14, 2010, July 14, 2010, and July 28, 2010.

WRC does not now argue for final resolution of this matter, nor does WRC now recommend any specific final action. Rather, WRC argues here that the record established thus far makes clear that a harm may have occurred; that the Board does have authority to continue the investigation into the leak of tritium, other byproducts of nuclear fission and other potential contaminants from the Vermont Yankee nuclear plant (the Station); and that the Board does have authority to take action at the conclusion of the investigatory process. WRC argues the investigation should continue through technical hearings and final briefing, and should be coordinated with docket 7440.¹ It is evident that the Board has substantial authority in this docket, and a detailed brief of preemption would appear unnecessary but for the arguments advanced by Entergy VY. Although WRC does not now reply directly to the Initial Brief filed by Entergy VY on May 18, 2010, we will reference arguments offered in that brief.

It is understood that the Board must yield to the Nuclear Regulatory Commission (NRC) on matters of nuclear health and safety where a ruling would conflict with NRC regulation or have a clearly established “direct and substantial” effect on nuclear plant construction or operation. However, this federal preemption leaves a wide area in which the Board has jurisdiction. Specifically, the Board may:

- 1) Investigate any action or event at the Station to the extent necessary to determine if certificate revocation or modification, or any other action, is warranted.
- 2) Revoke the existing Certificate of Public Good issued through Public Service Board docket 6545. The Board has the authority under Section 231(a) of Title 30 to amend or revoke any certificate for good cause, a provision that existed prior to the initiation of docket 6545.²

¹ Docket 7440 is captioned “*Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their Certificates of Public Good and other approvals required under 10 V.S.A. §§ 6501-6504 and 30 V.S.A. §§ 231(a), 248 & 254, for authority to continue after March 21, 2012, operation of the Vermont Yankee Nuclear Power Station, including the storage of spent-nuclear fuel*”

² “... For good cause, after opportunity for hearing, the board may amend or revoke any certificate awarded under the provisions of this section. If any such certificate is revoked, the person, partnership, unincorporated association, or previously incorporated association shall no longer have authority to conduct any business which is subject to the jurisdiction of the board whether or not regulation thereunder has been reduced or suspended, under section 226a or 227a of this title. (30 V.S.A. §231(a))

- 3) Modify the existing Certificate of Public Good issued through PSB docket 6545, providing that modification does not conflict with the narrow limits established under preemption doctrine. For example, the Board could hold the parent company responsible for decommissioning costs related to this and/or future leaks, or costs in addition to the NRC's minimum requirements.
- 4) Encourage Entergy VY to negotiate a Memorandum of Understanding that would satisfy the General Good and allow the Board to conclude the investigatory process without otherwise modifying or revoking the Certificate issued in docket 6545. For example, the Board could require specific remedial steps to remove contamination and to inspect structures.
- 5) Provide Entergy VY with recommendations based on the evidence and testimony gathered in this docket. Recommendations may, at the very least be designed to offer non-compulsory guidance.
- 6) Request that Entergy VY establish a detailed voluntary compliance protocol that would address issues and concerns raised in this docket. Entergy VY, without objection, already participates in voluntary compliance programs established by industry trade groups such as the Nuclear Energy Institute.
- 7) Provide the NRC with recommendations based on the evidence and testimony gathered in this docket. Such recommendations could be offered in advisory terms even if without legal effect.
- 8) Utilize the testimony, evidence, and conclusions in this docket to address pending concerns about misrepresentations in docket #7440, and the effect of those misrepresentations.³
- 9) Utilize conclusions in this docket to analyze and address system stability and reliability under 30 V.S.A. 248(b)(3)⁴ in docket 7440.
- 10) Utilize conclusions in this docket to address a balancing of the "General Good" in docket 7440.
- 11) Determine at the conclusion of this docket that no further action is necessary.

³ Docket 7440 has been reopened to address inaccurate testimony provided by Entergy VY witnesses. In awarding attorney fees to WRC and other Parties the Board stated "...in the current docket there is a clear casual connection between the misrepresentations made by Entergy VY and additional expenses that WRC, VPIRG, and NEC would incur, and in fact, have incurred in this docket." (Board Order dated June 4, 2010, page 10) That misrepresentations have occurred is clear, the extent and effect of those misrepresentations is still to be determined.

⁴ 30 V.S.A. 248(b)(3) requires that "Before the public service board issues a certificate of public good as required under section (a) of this section, it shall find that the purchase, investment, or construction:...(3) will not adversely affect system stability and reliability;"

The Role of Windham Regional Commission

Windham Regional Commission (WRC) is an association of 27 towns, formed in 1965, subsequently constituted by the State Legislature, and now operating under Vermont Municipal and Regional Planning Development Act (24 V.S.A. Chapter 117). The WRC's mission is to assist member towns to provide effective local government and to work cooperatively with them to address regional issues.⁵

The Regional Plan includes a Vision Statement which encourages public involvement and asserts the right and obligation of elected and appointed officials to act as follows:

“For the Communities...Decision making that encourages public involvement at every stage, and affirms the legal right and obligation of elected and appointed officials to act. An educated and informed citizenry ready to make effective choices.”⁶

The 2006 Windham Regional Plan includes the following policy, which serves as the driving force in our engagement on VY issues:

“4.6(4)(d): Effectively and adequately address all issues related to facility operation and reliability, recognizing that in some instances they are inextricably intertwined with public health and safety concerns.”⁷

The Vermont Yankee station is located in the Town of Vernon, within the Windham Region. The station is an important component of the regional and state economies, and occupies 125 acres of prime industrial real estate with ready access to road, rail, water, and power infrastructure. The station is an important employer with more than 620 workers, and it provides a local payroll of approximately \$60 million.⁸ The station is responsible for 2% of Windham County employment, and 5% of the compensation earned in Windham County.⁹ The station has contracted to provide about one third of Vermont's electric energy demand,¹⁰ and plant production comprises the majority of in-state electric generation. Vermont distribution utilities have

⁵ 2006 Windham Regional Plan, page 2

⁶ 2006 Windham Regional Plan, page 1

⁷ 2006 Windham Regional Plan, page 47

⁸ “The Economic Impact of the VY Station on Windham County and Vermont” prepared by Richard W. Heaps, February 15, 2008, filed as exhibit EN-RWH-1 in docket 7440. Page i.

⁹ The Economic Impact of the VY Station on Windham County and Vermont” prepared by Richard W. Heaps, February 15, 2008, filed as exhibit EN-RWH-1 in docket 7440. Page 9.

¹⁰ 2005 Vermont Electric Plan, chapter 2 page 10 (2-10). These percentages are based on the 510 MW of production available when the Plan was issued in January, 2005 before VY's capacity was increased to 620 MW.

the right to receive 48% of the energy and capacity of the station (after the power uprate) through an agreement signed when the station was purchased.¹¹

The long-term beneficial commercial development and use of this land is important to the state and Region. Any delay in returning this land to productive use following the eventual closure of the plant would have negative effect upon the economy of the state and Region.¹²

WRC is participating in this docket pro se, and neither supports nor opposes the continued operation of the VY station.

History

Entergy VY purchased the VY Station from Vermont Yankee Nuclear Power Corporation (VYNPC) in 2002 and was issued a Certificate of Public Good (CPG) by the Board in docket #6545, concluding in June 2002. The CPG is scheduled to expire on March 21, 2012.

Subsequent to receiving the initial CPG in 2002, Entergy VY petitioned the Board for authorization to make substantial structural changes to the station and to then increase power output (Docket 6812), and to add a dry fuel storage facility (Docket 7082).

On March 3, 2008 Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations Inc. (ENVY and ENO, collectively as Entergy VY) petitioned the Board for authorization to continue operating beyond March 21, 2012. In response to that petition, the Board opened docket #7440. In the course of proceedings for the extension of the CPG Entergy representatives made statements to the public and the Vermont Legislature, and testified before the Board under oath, stating that the plant does not have underground pipes that carry radionuclides.

On November 17, 2009 a water sample was taken from a testing well on the VY site and delivered to an off-site laboratory for analysis. On January 6, 2010 the results of that testing were returned to Entergy VY indicating an unusual concentration of tritium. Entergy VY conducted on-site testing and analysis on January 6, 2010 and January 7, 2010 which confirmed elevated

¹¹ Docket 7440, prefiled written testimony of Scott M. Albert for the Department of Public Service, November 14, 2008, page 4, line 14

¹² The existing Certificate of Public Good is scheduled to expire on March 21, 2012. Entergy VY has requested an extension of that CPG in docket 7440 to match the 20 year NRC license extension for which it has applied. Regardless of the outcome of that request, the VY station will inevitably cease operations at some point in the future.

tritium levels. On January 7, 2010 Entergy VY notified federal and state regulatory agencies and other stakeholders of the sampling results.¹³

On January 27, 2010, the Board convened a status conference under docket 7440 to consider issues related to the elevated levels of tritium that had been discovered at the station.

Upon confirmation of the initial test result, Entergy VY immediately began an internal investigation to determine the source of the tritium, and on February 13, 2010 used a small camera to identify a leaking pipe in the underground AOG pipe tunnel, and water pooling on the floor of that tunnel. The pipe (referred to as the Bravo drain line by Entergy VY) was removed from service on February 13, 2010, and the tunnel drain was cleared on February 15, 2010.¹⁴ The tunnel was accessed by a different camera system on March 4, 2010 and a “dime sized hole” was identified in a second pipe which was removed from service. Entergy VY then concluded that the two underground leaking pipes were the source of the tritium.¹⁵

Soil samples were taken in the area of the leak on February 26, 2010 and March 18, 2010, and on March 31, 2010 silt was sampled from the floor of the AOG pipe tunnel.

“The sample analysis results indicated the presence of plant-related, gamma-emitting radioisotopes near the source of the suspected leak; Mn-54, Co-60, Zn-65 and Cs-137...”¹⁶

On February 25, 2010 the Board opened docket # 7600 to investigate the then unresolved tritium leak; to determine if it was appropriate to require Entergy VY to cease operations or to take other ameliorative actions; to determine if the CPG issued under docket #6545 should be revoked or modified; and to determine if penalties should be imposed on Entergy VY for violations of Vermont statutes or Board orders. Within the Order, the Board considered federal preemption:

“With respect to federal preemption, it is clearly established that the Board would be preempted from attempting to regulate Vermont Yankee based on radiological safety. However, it is also well established that the Board retains significant authority in other areas of traditional state regulation. This retained state authority includes some regulation related to the land-use and economic issues (including

¹³ Prefiled written testimony of Timothy G. Mitchell, March 31, 2010, page 3

¹⁴ Prefiled written testimony of Timothy G. Mitchell, March 31, 2010, page 5

¹⁵ Prefiled written testimony of Timothy G. Mitchell, March 31, 2010, page 7

¹⁶ Entergy VY “Root Cause Evaluation Report” page 10

reliability issues) associated with nuclear material, other than matters of radiological safety.”¹⁷

* * *

“Accordingly, we conclude that we are not preempted from taking action in response to the leaks at Vermont Yankee, to the extent that the leaks may have economic and other non-radiological-health-and-safety consequences and to the extent that our action neither conflicts directly with NRC’s exercise of its federal jurisdiction nor frustrates the purposes of the federal regulation.”¹⁸

On March 10, 2010 the Board convened a prehearing conference, and then on March 18, 2010 issued a Prehearing Conference Memorandum in which it established a schedule for written testimony, discovery, and finally briefings on the scope of the Board’s jurisdiction.

On April 30, 2010 or May 3, 2010 Entergy VY filed a Motion to Modify the Prehearing Conference Memorandum.¹⁹ Entergy VY sought to enlarge the time for responding to pending discovery, limit the scope of discovery, and accelerate the briefing of scope and jurisdiction within the sequencing of the schedule such that scope and jurisdiction would be briefed prior to the filing of party testimony. Entergy VY also stated that the entire matter was preempted by federal law, and that many of the questions raised in discovery were likewise preempted.

On May 14, 2010 the Board responded to the Entergy VY Motion by extending the time for pending discovery, but denied a change in scope or the accelerated briefing of jurisdiction. The Board based the forward schedule on the (at the time) unknown concluding date of an in-process refueling outage,²⁰ which would place Initial Briefing of scope and jurisdiction in August 2010. The Board agreed that Entergy VY could file its Initial Brief covering scope and jurisdiction before the scheduled date for that briefing, but would not be required to do so.²¹

¹⁷ Board Order, docket #7600, February 25, 2010, page 6

¹⁸ Board Order, docket #7600, February 25, 2010, page 7

¹⁹ The Entergy VY Motion was dated on Friday, April 30, 2010. In the Board Order dated May 14, 2010, the Board identifies the date of this filing as Monday, May 3, 2010.

²⁰ The Board issued the Order on May 14, 2010 while the refueling outage was underway. The outage was projected to take approximately one month, and was expected to conclude late in May, 2010. On June 5, 2010 Entergy VY notified the Board that the station had concluded the outage and had achieved stable 100% power production.

²¹ “Meanwhile, Entergy VY remains free under this amended schedule to file its jurisdictional brief on May 18, 2010, if it so chooses.” Board Order May 14, 2010, page 11.

On May 18, 2010 Entergy VY filed its Initial Brief covering scope and jurisdiction, and on June 15, 2010 Entergy filed its responses to the pending discovery questions.

On May 28, 2010 during start-up activities an additional leak was identified in a drain line near the interface with the AOG Drain Pit wall. Preliminary visual inspections identified a small hole in an area with external pipe corrosion.²² This leak occurred after the conclusion of Party discovery, and there exists relatively scant information about it.

On July 14, 2010 the Board issued a Procedural Order fixing the date for direct briefs as August 20, 2010 and denying an extension of the discovery schedule, but accepting that Parties will be able to address an additional leak identified on May 28, 2010 “during the technical hearings to come.”²³

On July 28, 2010 the Board issued a Procedural Order that changed the date for Direct Jurisdictional Briefs to August 27, 2010.²⁴

Review of Entergy VY Position Regarding Preemption

Entergy VY has argued that matters covered in this docket are preempted by the NRC under the Atomic Energy Act (AEA).

Specifically, Entergy VY asserts that any action that would have a “direct and substantial” effect on nuclear plant operations is preempted by federal law, although Entergy VY acknowledges some regulation which it terms “tangential” might be permissible. Entergy VY appears to view this area of potential state regulatory action narrowly, suggesting that regulating elements such as minimum wage and child labor laws would be reasonable,²⁵ as would areas delegated to the states by Congress (such as air pollution)²⁶ but that the Board can go no further.

Entergy VY asserts that once a nuclear plant has been approved for construction, states have no further authority over the construction or operation, arguing in its Initial Brief:²⁷

²² Response of Entergy VY to ANR’s first set of information requests, ANR:EN.1-32, pages 35-36

²³ Board Order July 14, 2010, page 4, footnote 13

²⁴ Board Order, Docket #7600, July 28, 2010, page 2

²⁵ Initial Brief of Entergy VY dated May 18, 2010, page 18

²⁶ Initial Brief of Entergy VY dated May 18, 2010, page 2, footnote #1

²⁷ Entergy VY is represented by Downs Rachlin Martin PLLC, (<http://www.drm.com/attorney-search>), and is joined Of Counsel in this brief by Goodwin Procter LLP, (<http://www.goodwinprocter.com/Our-Firm.aspx>). Goodwin Procter LLP is a member of the Nuclear Energy Institute (<http://www.nei.org/aboutnei/>). (Web sites accessed August 15, 2010)

“While the Supreme Court in PG&E explained that Congress did not intend to preempt traditional state authority with respect to authorizing new utility plants, and therefore a state may prohibit the building of nuclear utility plants on economic grounds, the Court was equally clear that once a new plant has been approved, its construction and operation are beyond a state's authority regardless of the state's motivation.”²⁸

Entergy VY argues that any action by the Board to shut the plant down would have a “direct and substantial” effect on the operation of the plant, and states:

“Obviously requiring the VY Station to stop operations in this docket would have a “direct and substantial” effect on plant operations. Unsurprisingly, therefore, multiple courts, including the U.S. Court of Appeals for the Second Circuit in County of Suffolk, have decided that an injunction requested by a state or local government against operation of a nuclear plant is preempted.”²⁹

Entergy VY goes on to argue that since what it describes as the underlying issue in this docket, the release of radionuclides, is preempted that:

“As an initial matter, any Vermont statutes or Board orders concerning the release of radioactive substances are themselves preempted because they have a direct and substantial effect on plant operation and radiological safety; as discussed above, NRC regulations deal comprehensively with the subject of the release of radiological materials, occupying the field. Imposing penalties on a nuclear plant for failure to comply with state laws is simply one means of enforcing such laws; if the state law concerning radionuclide releases is preempted, then so too is any penalty for violation of that law.”³⁰

Entergy VY takes preemption even further, arguing that merely investigating any element that may later be considered preempted is itself preempted, because cooperating with investigations might impose significant costs and burdens. Entergy VY argues:

“As to the direct and substantial test, cooperating with investigations by state authorities into nuclear-plant construction, operational and safety issues can impose significant costs and burdens—personnel time

²⁸ Initial Brief of Entergy VY dated May 18, 2010, page 3

²⁹ Initial Brief of Entergy VY dated May 18, 2010, page 24

³⁰ Initial Brief of Entergy VY dated May 18, 2010, page 25

and overtime, attorney fees, risks inherent in maintaining the security of federally-restricted information, and so forth—on a nuclear operator, costs and burdens potentially as great (if not more so) than those of the on-site inspection at issue in County of Suffolk. The threat of imposing such costs and burdens on a nuclear operator gives not only states, but also non-government interest groups operating in state forums, the ability to leverage nuclear operators into complying with construction and operational standards not required under federal law.³¹

Entergy VY has defined a very limited role for the Board, and even appears to characterize the ‘goal’ of the Board as that of a cheerleader for the VY Station, stating that the Board’s goals are the same as Entergy VY’s:

“Entergy VY’s goal, like that of the Board, is to keep Vermont’s citizens fully apprised about all significant aspects of the VY Station’s operations so that they can understand and fully appreciate the substantial overall benefits that the plant provides to the state.”³²

WRC Argument Regarding Preemption

The assertions regarding preemption advanced by Entergy VY, if allowed to remain unchallenged, would all but eliminate the role of Vermont state government in the reasonable oversight of electric generating stations powered by nuclear fuel. The single such nuclear station in the State of Vermont has tremendous economic impact, and is a major employer and source of tax revenue, all areas subject to traditional state oversight. Likewise, the electricity produced by the plant comprises most of the in-state production of electricity, and roughly 1/3 of all the electricity contracted by utilities within Vermont.

It would simply not be possible for the Board to adequately regulate the production or distribution of electric power within Vermont if the VY Station were entirely beyond the grasp of state regulation. Nor would it be possible to reasonably assure the station serves the General Good if its operation were to be completely ignored simply because of the technology with which it produces energy.

The assertion by Entergy VY that once a state has authorized the construction of a nuclear generating station all further state regulation is prohibited should be rejected by the Board. This claim, if allowed to stand, would create an island of complete federal jurisdiction within the borders of Vermont, and would allow a private company to dictate how electric power is produced within the state, what energy sources are available to Vermont

³¹ Initial Brief of Entergy VY dated May 18, 2010, page 27

³² Initial Brief of Entergy VY dated May 18, 2010, page 4

consumers, and how critical industrial land will be utilized for many decades to come. Such autonomy would have far reaching physical, social, economic, and land use impacts, and would deny the right of elected and appointed officials to represent the interests of their constituents and to balance the evolving needs of the state. In essence, the jurisdiction and scope being argued here are related not only to nuclear issues, but also to federalism and the right of state governments to regulate economic and land use activity within their borders.

The Atomic Energy Act of 1954 never contemplated absolute federal jurisdiction in the oversight of every aspect of a civilian nuclear power plant, or a requirement that states must accept the construction and indefinite operation of a nuclear power plant within their borders. The United States Supreme Court took a dim view of absolute federal jurisdiction over nuclear plants in *PG&E v. State Energy Commission* (461 U.S. 190, 1983);

“Even a brief perusal of the Atomic Energy Act reveals that, despite its comprehensiveness, it does not at any point expressly require the States to construct or authorize nuclear power plants or prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors. Instead, petitioners argue that the Act is intended to preserve the federal government as the sole regulator of all matters nuclear, and that § 25524.2 falls within the scope of this impliedly preempted field. But as we view the issue, Congress, in passing the 1954 Act and in subsequently amending it, intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.”³³

While the federal government is responsible for assuring that civilian nuclear power is safe, the federal government does not balance that finding of safety against specific alternatives at the state level. Indeed, it is the continuing responsibility of state regulators to decide which of many generating technologies will be deployed within the borders of that state, and how the electric energy needs of the public will be met as technologies and needs change over time. Once constructed, the direct operational control of a nuclear plant rests with the NRC, not the states, but the states retain the right to distinguish nuclear plants from other power sources, and to determine which technologies will be used to supply electric energy. The ability to revoke or modify a certificate is central to this determination, and is

³³ Decision of the Court, Page 461 U.S. 205

not limited to the period before construction as Entergy VY asserts, but is instead woven into the delicate ongoing balance of many different factors that comprise the evolving economic, land use, and energy profiles of the state.³⁴

Justice Blackmun authored a concurring opinion in PG&E joined by Justice Stevens, which made clear that *how* the plant operates is under the jurisdiction of the NRC, but *if* the plant operates remains a matter under state control based on the balancing of traditional state interests. While Justice Blackmun was writing of the pre-construction phase, his arguments hold true during that period following construction, at least as far as whether the plant should continue to operate:

*"First, Congress has occupied not the broad field of "nuclear safety concerns," but only the narrower area of how a nuclear plant should be constructed and operated to protect against radiation hazards. States traditionally have possessed the authority to choose which technologies to rely on in meeting their energy needs. Nothing in the Atomic Energy Act limits this authority, or intimates that a State, in exercising this authority, may not consider the features that distinguish nuclear plants from other power sources. On the contrary, §271 of the Act, 68 Stat. 960, as amended, 42 U.S.C. § 2018, indicates that States may continue, with respect to nuclear power, to exercise their traditional police power over the manner in which they meet their energy needs. There is, in short, no evidence that Congress had a "clear and manifest purpose," Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947), to force States to be blind to whatever special dangers are posed by nuclear plants."*³⁵

* * *

Federal pre-emption of the States' authority to decide against nuclear power would create a regulatory vacuum. See Wiggins, Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study, 13 U.C.D.L.Rev. 3, 64 (1979). In making its traditional policy choices about what kinds of power are best suited to its needs, a State would be forced to ignore the undeniable fact that nuclear power entails certain risks. While the NRC does evaluate the dangers of generating nuclear power, it does not balance those dangers against the risks, costs, and benefits of other choices available to the

³⁴ The Board must be careful in its application of certificate revocation so as to respect the very significant investment the owner has made in a nuclear power plant. The arbitrary revocation of a CPG could have devastating effect on the willingness of investors to provide the capital needed for large energy generation stations of all kinds.

³⁵ PG&E v. State Energy Commission, 461 U.S. 224, Concurring Opinion by Justice Blackmun with Justice Stevens joining.

State or consider the State's standards of public convenience and necessity.

* * *

In short, there is an important distinction between the threshold determination whether to permit the construction of new nuclear plants and, if the decision is to permit construction, the subsequent determinations of how to construct and operate those plants. The threshold decision belongs to the State; the latter decisions are for the NRC.³⁶

The Board has recognized that nuclear safety itself is preempted, but has long held there is room for dual federal and state regulation where the two regulatory schemes do not directly conflict, and of course the Board always retains the right to revoke any Certificate of Public Good even long after construction is complete. Although a certificate holder may choose to ignore reasonable requests of the Board, it does so at the risk of certificate revocation.³⁷ It is this final and ultimate action, the revocation of a certificate, which gives the Board authority to investigate and then seek reasonable concessions from a certificate holder to assure the certificated generation facility will continue to meet the standards of 30 V.S.A. §248, and will promote the General Good.

The potential for a certificate holder to face revocation, or to have an existing certificate amended, is clearly articulated in 30 V.S.A. §231(a) as follows:

“For good cause, after opportunity for hearing, the Board may amend or revoke any certificate awarded under provisions of this section.”

The Board has cautioned that it is essential for Parties and state regulators to recognize the unique authority of the NRC, just as it is essential for Parties and other government entities to recognize the authority of the State of Vermont and of the Board. Yet, the Board also recognizes that even when its authority is limited by law, it may still identify concerns exposed through detailed analysis, and may offer advisories to the NRC, even if without legal effect.

“...First, our authority, like the NRC’s is conferred by law. If we did not respect the choice of elected representatives of the people to give

³⁶ PG&E v. State Energy Commission, 461 U.S. 225, Concurring Opinion by Justice Blackmun with Justice Stevens joining.

³⁷ Entergy VY asserts the Board does not have authority to revoke a certificate, concluding: *“Indeed, there appears to be no example of a state ordering an operating, non-public utility plant to cease operations, without such an order being found preempted.”* Initial Brief of Entergy VY, May 18, 2010, page 24

NRC its power, we would have no right to expect VYNPC or its owners to respond to the authority that lawmakers have given to this Board. Second, despite the limitations on our authority, if we did see the transfer of Vermont Yankee to ENVY as creating a safety risk, we would say so bluntly and clearly in advisory terms even if without legal effect...”³⁸

Entergy VY purchased the Station in 2002. In the review of that sale, the Board considered the relative merits of the existing ownership by VYNPC with ownership by Entergy VY. New England Coalition expressed a concern that the Board would have less control if the sale was approved. The Board disagreed with the NEC assertion that control would be reduced, and then clarified its authority as follows:

“The Board has the authority under Section 231(a) of Title 30 to amend or revoke any Certificate for good cause. Thus, if the Board were to find upon a compelling record that any owner's ownership of Vermont Yankee no longer promoted the general good, the Board could revoke the Certificate, regardless of whether it was held by ENVY or VYNPC.”³⁹

Obviously, the Board would require a compelling record in order to revoke or amend a certificate. The need and development of such a record was addressed in associated footnote 159 as follows:

“This assumes, of course, both a fair and thorough administrative proceeding and a set of concerns that would be adequate despite federal preemption as to radiological safety.”⁴⁰

This docket (7600) was opened in response to allegations that representatives of Entergy VY had misrepresented facts in an existing docket (7440) that had been opened at Entergy VY's request to secure a Certificate of Public Good for operations beyond March 21, 2012, and that the misrepresentations were related to a leak identified in January 2010. The Board separated the two issues and determined that this docket would examine the leak issue, and the allegations of misrepresentation would be handled in docket 7440. It is quite possible that the examination of the leak in this docket may inform docket 7440 and help the Board better understand plant reliability or balance the ongoing General Good. It is therefore reasonable to consider the investigation and any proposed outcome in this docket in the context of docket 7440, and in the shadow of the existing CPG issued in docket 6545.

³⁸ Docket 6545, Decision of the Board, page 125

³⁹ Docket 6545, Decision of the Board, page 80

⁴⁰ Docket 6545, Decision of the Board, page 80

Entergy VY certainly understands and accepts the authority of the Board to consider operations beyond March 21, 2012, and to determine whether that extension will promote the General Good.⁴¹ The Board made this authority crystal clear in docket 6545 as follows:

*“...Upon review of state and federal law, we conclude that Vermont’s authority to determine whether a license extension promotes the general good is not preempted. By entering into a binding contractual commitment with the Department, upon which we expressly rely in reaching our decision today, ENVY has eliminated much of the jurisdictional uncertainty.”*⁴²

The challenges to Board authority asserted by Entergy VY in docket 7600 are especially troubling in light of the generally favorable history of accepting oversight and operational limits throughout the company’s ownership of the VY station.

Indeed, Entergy VY accepted the right of the Board to grant a certificate for the sale of the station in 2002, and to prohibit operations after March 21, 2012.⁴³ If the arguments Entergy VY makes in docket 7600 are to now be embraced, then once the construction of the plant had been approved and resources devoted to construction the state would have had no further right to regulate ownership or operation. Obviously Entergy VY understands the Board does have a continuing interest in assuring the viability of electric generating plants within the state, and the capability of plant owners to operate facilities in a manner that serves the General Good.

Entergy VY, by the very filing of petitions for CPGs to increase power generation, to construct an interim spent fuel storage facility, to extend operation beyond March 21 of 2012, as well as numerous other petitions, in fact has acknowledged that the state, having authorized initial construction, nonetheless retains substantial authority and jurisdiction going forward.

⁴¹ This limited agreement is included in paragraph 12 of the MOU executed in docket 6545 which states in part: “...Each of VYNPC, CVPS, GMP, ENVY and ENO expressly and irrevocably agrees: (a) that the Board has jurisdiction under current law to grant or deny approval of operation of the VYNPS beyond March 21, 2012 and (b) to waive any claim each may have that federal law preempts the jurisdiction of the Board to take the actions and impose the conditions agreed upon in this paragraph to renew, amend or extend the ENVY CPG and ENO CPG to allow operation of the VYNPS after March 21, 2012, or to decline to so renew, amend or extend.”

⁴² Docket 6545, Decision of the Board, page 81 - 82

⁴³ Docket 6545, Decision of the Board dated June 13, 2002, page 159, and Memorandum of Understanding paragraph 12

Entergy VY willingly accepted the initial Certificate of Public Good in docket 6545, and entered into an agreement that granted state regulators broad access to the plant for the purpose of oversight, without raising the claim to absolute federal jurisdiction regarding all matters nuclear. It is illogical to conclude that Entergy VY accepted oversight by the Vermont Department of Public Service without recognizing that the identification of problems under that inspection scheme might result in some kind of Board action that would have a “direct and substantial” effect on operations. Likewise, Entergy VY accepted the balancing of financial risks, and the conditions under which decommissioning would take place, as well as elevated standards that would define decommissioning.⁴⁴

Since the discovery of the leak of tritiated water that precipitated docket 7600, Entergy VY has provided further facility access for Dr. William Irwin of the Vermont Department of Public Health serving as the state’s Radiological Health Chief, Uldis Vanags of the Vermont Department of Public Service serving as the state’s Nuclear Engineer, and Lawrence Becker of the Vermont Agency of Natural Resources.⁴⁵ Each of these state representatives has been granted access to monitor the tritium response, and as is the case with the ongoing monitoring approved under docket 6545, Entergy VY can not possibly argue the monitoring has value to the state if there is no opportunity for subsequent state intervention that might have a “direct and substantial” effect on operations.

On March 15, 2004 Entergy VY was granted a Certificate of Public Good (docket 6812) that allowed a 20% uprate of power production. The very nature of this certificate must infringe on areas that Entergy VY now argues are beyond the reach of the Board, yet Entergy VY willingly participated in the process and accepted conditions that would quite obviously have a “direct and substantial” effect on plant operations. Specifically, among other requirements, the Board required Entergy VY to install 200hp fans on the cooling towers rather than 125hp fans,⁴⁶ and ordered:

“6. Consistent with Entergy’s current operating practices, in the event of a waste-heat cooling system malfunction, Entergy shall reduce power at a rate of at least 10 percent per minute until the cooling water discharge returns to and remains within the temperature limits in the National Pollutant Discharge Elimination System permit.”⁴⁷

⁴⁴ Docket 6545, Memorandum of Understanding, paragraph 9

⁴⁵ Docket 7600, EN-JH-1, page 4, paragraph 11

⁴⁶ Docket 6812, Decision of the Board, page 119

⁴⁷ Docket 6812, Decision of the Board, page 119

Both of these requirements, although rooted in areas that would reasonably draw state interest, nonetheless would have “direct and substantial effect” on plant operations, and both were willingly accepted by Entergy VY without claim to preemption. Further, the Board requested by written letter that the Nuclear Regulatory Commission conduct a very specific independent engineering assessment to determine the reliability of the proposed upgrades, and retained jurisdiction to modify the order until that assessment was satisfactorily completed.⁴⁸ The Board, through this action, asserted jurisdiction to officially raise issues of concern and proposed remedies before the NRC, and that action was actually embraced by Entergy VY.⁴⁹

On April 26, 2006 Entergy VY was issued a Certificate of Public Good to construct a dry fuel storage facility as part of docket 7082. Once again Entergy VY acknowledged the Board’s authority and jurisdiction, even though quite clearly a denial of a certificate would have required a premature shut down of the plant, which by the logic Entergy VY offers in docket 7600 would have had an obvious “direct and substantial effect” on plant operations. Within that order, the Board limited the spent fuel that could be stored at the facility to fuel burned at the station, and prohibited the storage of fuel burned elsewhere.⁵⁰ Likewise, the MOU Entergy VY entered into included a number of conditions that would add balance to the weighing of the General Good, among these conditions are requirements that cask temperature be monitored, and that the spent fuel pool be configured such that high decay assemblies are surrounded by low decay assemblies.⁵¹ Entergy VY accepted these conditions, even though under the broad arguments Entergy VY has raised in docket 7600 where and how spent fuel is handled and stored would fall exclusively within NRC jurisdiction, and any conditions on how spent fuel is handled would have a “direct and substantial” effect and be preempted. The accepted conditions are not consistent with the current claim of preemption.

Not only has Entergy VY responded favorably to orders of the Board that it now appears to believe are within preempted territory, Entergy VY has also embraced recommended procedures of industry trade groups, including the Nuclear Energy Institute (NEI) Groundwater Protection Initiative.⁵² Entergy VY has expended considerable resources to install some (although not yet all) of the monitoring wells required by this voluntary industry program. Likewise, Entergy VY has made changes to the Buried Piping and Tank

⁴⁸ Docket 6812, Decision of the Board, page 118; page 5; Appendix D page 125

⁴⁹ Docket 6812, Decision of the Board, page 5 footnote 7

⁵⁰ Docket 7082, Decision of the Board, page 90 paragraph 4 and 5

⁵¹ Docket 7082, Decision of the Board, page 85

⁵² DPS-UV-2 “Supplemental Report to the Comprehensive Reliability Assessment of the Vermont Yankee Facility” page 75

Inspection Program in response to industry initiatives such as the Electric Power Research Institute (EPRI) guidance document 1016456.⁵³ It is illogical that Entergy VY would agree to meet commercial industry guidance and standards without a claim of preemption, but would not agree to meet the standards of a government regulatory body that is legally empowered to grant or deny an operating certificate.

Through all of these actions Entergy VY has exhibited an understanding that reasonable conditions may be required through Board Decisions and Orders, and through Memorandums of Understanding so that operations will continue to meet the broad balancing of the General Good, and to allow the Board to then issue or maintain a CPG.

WRC argues that the Board has the authority to revoke a certificate it has issued. Revocation could be based on purely financial concerns that clearly fall outside preempted areas; on a need to assure the stability and reliability of the electric generating and distribution network within the state; on the need for an ongoing balancing or rebalancing of the General Good that was established when the CPG was originally issued; or any other traditional state interest. That the Board may revoke a certificate for cause appears plainly obvious.⁵⁴

Under the interpretation advocated by Entergy VY, the Board lacks authority to require unspecified ameliorative actions related to the handling of nuclear material. But even if this is so, the Board can insist that any identified issues be remedied through voluntary action or MOU, and can certainly revoke the CPG if Entergy VY refuses to make changes that would ensure system reliability or serve the General Good. Likewise, the Board may require any investigation or inspection that it deems necessary to fully assess the need for certificate revocation. Entergy VY's assertions of nearly absolute preemption should be rejected.

WRC Argument Regarding Potential Harm

It is clear that the Board does have authority to act, but that authority is not sufficient absent a reasonable expectation of harm. WRC notes that in order to take final action at the conclusion of this docket, both the authority to act and a reason to act must have been established through the hearing process. The Board has expressed a desire for Parties to specify an actionable harm

⁵³ DPS-UV-2 "Supplemental Report to the Comprehensive Reliability Assessment of the Vermont Yankee Facility" page 47

⁵⁴ It is clear that if the state were to be denied the ability to ever revoke a certificate to operate once it had been issued, even for good cause, the state would become reluctant to issue any operating certificates at all. A finding of absolute preemption following initial approval would thus have a chilling effect on state approval of future nuclear power plants, and would thwart the original objectives of the Atomic Energy Act.

that would warrant continuing this docket,⁵⁵ and WRC now turns to those potential harms.

In this case a large quantity of tritiated water has been released into the ground and has been documented to move toward the Connecticut River.⁵⁶ Some of that liquid has certainly reached the river⁵⁷, some has been extracted by Entergy VY and stored on site for use in plant operation, and some likely will remain in the ground for an extended period of time. Additional radioisotopes have entered the ground in the vicinity of the identified leaks and have been captured by the surrounding soils.

WRC does not argue here that a definitive harm has occurred, but rather outlines several potential harms that should be further explored through additional discovery and technical hearings, and then briefed by Parties. That a harm may have occurred has already been embraced by the Board.

The Board identified one potential harm in the Order opening this docket on February 25, 2010. WRC believes this potential harm remains manifest and requires additional investigation. The Board stated:

“It appears indisputable that the leaks may result in increased site contamination that could substantially increase decommissioning costs. Increased site contamination could also delay completion of the decommissioning process, which in turn could affect the future economic use of the site. These concerns do not fall within the preempted sphere of radiological health.”⁵⁸

The Vermont Agency of Natural Resources has stated unequivocally that the release is not supported by state permits.⁵⁹ The leak was first detected on January 6, 2010,⁶⁰ but the plant continued operating at full power even though test results showed increased tritium concentrations until at least

⁵⁵ Board Order Opening Investigation, dated February 25, 2010, page 7 and footnote 10

⁵⁶ No tritium has been reported to have been detected in the Connecticut River, which fact is attributed to dilution in a large volume of river water. “Well test results show tritium-contaminated groundwater is moving from west to east into the Connecticut River, where it is diluted to below the lower level of detection. Hydrogeology studies of the site also show that groundwater flows toward the river.” VT Dept. of Health, 3/17/2010, posted at http://healthvermont.gov/enviro/rad/yankee/tritium_archive.aspx (Web site checked August 15, 2010)

⁵⁷ Testimony of Michael Shaw on behalf of Entergy VY dated March 31, 2010, page 9 line 10-11, and Testimony of Stratton French on behalf of CLF, dated June 30, 2010, pages 22-25.

⁵⁸ Docket 7600, Order of the Board dated February 25, 2010, page 8

⁵⁹ July 2, 2010 prefiled written testimony for ANR of Chris Thompson, page 3, line 16; Dan Mason, page 4, line 4; John Akielaszek, page 4, line 19.

⁶⁰ Prefiled written testimony of Timothy Mitchell for Entergy VY, dated March 31, 2010, page 3, line 4

February 15, 2010 when the drain in the tunnel was cleared.⁶¹ Entergy VY did not apply for a discharge permit during this time, and continued to release known contaminants into the soil and groundwater while operating the plant at full power. This action has been referred to the Vermont Attorney General, and it may be a harm in itself. Entergy VY appears to rely on exclusive NRC jurisdiction with regard to radiological discharges, and WRC is not now taking a position on the preemption argument with regard to liquid discharges pending the assessment of the Vermont Attorney General.

The current operating certificate will expire in less than two years, and tritium has a half-life of 12.3 years.⁶² It stands to reason that if Entergy VY is not successful in securing an extended CPG, then the company must be prepared to fully decommission the plant beginning in March of 2012. The remaining tritium will add cost to that decommissioning process, or alternatively will contribute to the unnecessary delay of decommissioning, which ties up the 125 acre industrial site for an indefinite period.

Entergy VY has not provided assurance that the present leak will not contribute to added decommissioning costs. Entergy VY instead appears to rely on an extended period of decay to reduce the radioactivity, and appears to rely on meeting only the NRC standard for unconditional release, rather than the tighter standards recommended by the Department of Public Service and WRC in docket 7440. Entergy VY has stated:

*“The amount of soil or water that would need to be removed at decommissioning, if any, to meet the regulatory requirements will depend on, among other things, the timing of the termination of the license. This is because the radionuclides continue to decay to non-radioactive elements over time. By way of example, over a 62-year period of time approximately 97 percent of an initial quantity of tritium will have decayed to non-radioactive helium. At the time of license termination, any residual radionuclides from the recent tritium-release event may have decayed sufficiently to be within the applicable license-termination criteria without further actions.”*⁶³

* * *

*“Entergy cannot state at this time what, if any, expenses or types of leak-related remediation expenses for the AOG System leakage will be borne by the VY Station's decommissioning-trust funds.”*⁶⁴

⁶¹ Prefiled written testimony of Timothy Mitchell for Entergy, dated March 31, 2010, page 5, line 18

⁶² Prefiled written testimony of Ray Shadis for NEC, dated July 2, 2010, page 14, line 3

⁶³ Entergy VY April 12, 2010 response to CLF 1st round discovery question CLF:EN.1-17

⁶⁴ Entergy VY June 15, 2010 response to WRC discovery question WRC:EN.1-11i

If the cost to decommission has been increased at all by this leak, then the time when the plant can actually be decommissioned has been extended, and that creates a regional burden because this prime industrial real estate can not be quickly redeveloped. Likewise, the historical record showing tritium contamination from this and other leaks may have a detrimental effect on the resale and reuse of the property regardless of the extent of eventual water and soil remediation.

While it cannot now be known exactly when the station will be decommissioned, or to what radiological standard, it is reasonable to look at other leaks of tritium to gauge the residual and lasting effect of those leaks.

The Root Cause Evaluation Report provided by Entergy VY details a series of leaks in the Condensate Storage Tank in 1976 and 1986 (34 and 24 years ago respectively) and notes that tritium is still present in the sand bed and being detected, and that measurements in 2010 at the Tell-Tale Drain of 660K pCi/L are consistent with the earlier leaks.⁶⁵ It should be of concern that tritium from leaks 24 and 34 years ago is still being measured on site, and that water migration will not likely be sufficient to completely flush the ground before the expiration of the current Certificate of Public Good. Likewise, a leak of tritium at the Maine Yankee nuclear plant is still producing positive test results 13 years after the plant was shut down according to written testimony of NEC witness Ray Shadis:

*“Nor is tritium contamination, with an isotope half-life of 12.3 years, a short term issue. Maine Yankee has been fully decommissioned to a 20,000 pCi/L standard for more than five years with its most recent operation more than thirteen years ago; yet a recent sampling of an onsite monitoring well showed in excess of 30,000pCi/L.”*⁶⁶

In the matter of this leak, the release of tritiated water resulted from the failure of two separate pipes contained within a concrete structure that had been designed as a sealed unit. The containment of the structure itself appears to have failed, as did a separate concrete encasement, allowing two pathways for tritiated water to reach the ground. Once all of those failures were identified and corrected another pipe failure was detected that provided a third pathway for contaminated material to enter the ground. The sheer number of failures presents a reasonable concern that additional leaks may be detected in the future. This concern is then compounded because Entergy VY has not agreed to cover remediation of future leaks with operating expenses, but instead may impose those costs upon the decommissioning

⁶⁵ Entergy VY “Root Cause Evaluation Report” dated June 16, 2010, page 53

⁶⁶ Prefiled written testimony of Ray Shadis for NEC dated July 2, 2010, page 14, line 3.

fund. The willingness of Entergy VY to impose remediation costs from any future leaks upon the decommissioning fund is a grave concern, and was outlined in this WRC question and Entergy VY response:

Question

“iii) Will Entergy commit to covering the costs of any future leak or contamination with operating funds, or with parental funds, and will Entergy provide assurance that no decommissioning funds will be used to remediate damage from similar leaks in the future?”

* * *

Answer

“iii) Entergy cannot make a blanket commitment that the costs of any future leak or contamination would be paid from operating funds or with parental funds. What funds would be used to remediate any hypothetical future leak would depend on the specific circumstances, including but not limited to the timing of any such leak, the identity of the leaked substance, any potential hazard or threat associated with the leak, the need for remediation in order to meet applicable standards, the time to decay or natural abatement, whether the remediation is within the allowances in the decommissioning funds, etc.”⁶⁷

At the very least, the release of tritium and other radioisotopes from the Vermont Yankee station has added significant uncertainty as to the cost and timing of decommissioning, has illuminated a potential problem regarding aging infrastructure, has contributed to heightened public concern and doubt regarding the long term reliability of the station, and has brought further into question the adequacy of the decommissioning fund.

WRC Conclusion Regarding Preemption/Jurisdiction

It is clear that if the Board issues a Certificate of Public Good, the Board can revoke that certificate for cause, and can do so if conditions change such that the critical balance of the General Good is no longer affirmatively met. Entergy VY asserts in its brief that a state issued certificate can not be revoked, and has never been revoked without that action being found preempted. But Entergy VY also stipulated through a Memorandum of Understanding in docket 6545 that the Board has jurisdiction to deny continued operation beyond March 21, 2012.

At the very least, the Board has jurisdiction in this docket to continue the investigation, and to use the final results of this investigation in docket 7440 to assist in determining if the existing operating certificate should be

⁶⁷ Entergy VY Response to WRC First Set of Discovery Requests dated June 15, 2010, WRC:EN.1-10iii

extended beyond March 21, 2012. Although the Board does not have direct authority to regulate nuclear specific activities, it does have jurisdiction to decide how the state's energy needs will be met, and through that traditional state authority can revoke an existing certificate if the operation no longer meets the standards upon which the CPG was issued.

Vermont Yankee produces the majority of electricity generated within the state, and is a dominant provider of the electric energy consumed in Vermont. Unlike larger states such as California and Minnesota where *PS&G* and *Northern States* were decided, the ability to grant or deny a certificate to Entergy VY has a profound effect on traditional areas of state regulation. The Board has a right and obligation to act, and to approve and direct the production of electricity and directly related land use impacts in the state of Vermont.

Because the Board has the authority to revoke a certificate for cause or can deny an extension of an existing certificate, then the Board may use that leverage to encourage the holder of a CPG to voluntarily agree to conditions that would support positive findings and provide the Board grounds on which to grant continued operation. Entergy VY has agreed to multiple such conditions in MOU's negotiated in prior dockets, and can certainly choose to do so in this docket.

The Board must carefully consider the assertions of preemption and counterarguments made here and recognize that if the claims put forward by Entergy VY stand, and if the extension sought in docket 7440 is granted, the station effectively could be completely outside state control for the entire future of its existence. Even if the extension sought in docket 7440 is denied, the plant could remain under NRC license in a state of "SAFSTOR" for as long as 60 years, and if the Entergy argument were to be accepted, then absolute preemption would prevail throughout that period as well⁶⁸.

Given the Entergy VY assertion that once construction approval is granted it cannot be revoked or modified, it stands to reason that other states will almost certainly be watching this case carefully as they wrestle with whether to approve new operating permits for nuclear generating stations. The NRC traditionally grants a license for 40 years, has extended that license for an additional 20 years in many cases, and has in place the consideration of a program to grant a second 20-year extension, all followed by a period up to 60 years for post-operation site management and decommissioning. That framework could be viewed as placing the site beyond the control of state

⁶⁸ It is unclear how long spent fuel will remain on site, but that too must be conducted under an NRC license. The arguments advanced by Entergy VY suggest preemption would apply here too, perhaps for hundreds of years.

regulators for well over a century. The Atomic Energy Act, cited in this case as the source of preemption, was designed to encourage the development of civilian nuclear power,⁶⁹ but paradoxically the claims made here, if affirmed, could discourage states from granting initial construction authorization for fear of ceding control for many generations forward. The Board should be mindful that if Entergy VY's claims of absolute preemption are affirmed in this case it could discourage the development of nuclear power throughout the nation.

The Board should act, and as noted earlier may:

- 1) Investigate any action or event at the Station to the extent necessary to determine if certificate revocation or modification, or any other action, is warranted.
- 2) Revoke the existing Certificate of Public Good issued through Public Service Board docket 6545. The Board has the authority under Section 231(a) of Title 30 to amend or revoke any certificate for good cause, a provision that existed prior to the initiation of docket 6545.
- 3) Modify the existing Certificate of Public Good issued through PSB docket 6545, providing that modification does not conflict with the narrow limits established under preemption doctrine. For example, the Board could hold the parent company responsible for decommissioning costs related to this and/or future leaks, or costs in addition to the NRC's minimum requirements.
- 4) Encourage Entergy VY to negotiate a Memorandum of Understanding that would satisfy the General Good and allow the Board to conclude the investigatory process without otherwise modifying or revoking the Certificate issued in docket 6545. For example, the Board could require specific remedial steps to remove contamination and to inspect structures.
- 5) Provide Entergy VY with recommendations based on the evidence and testimony gathered in this docket. Recommendations may, at the very least be designed to offer non-compulsory guidance.
- 6) Request that Entergy VY establish a detailed voluntary compliance protocol that would address issues and concerns raised in this docket. Entergy VY, without objection, already participates in voluntary compliance programs established by industry trade groups such as the Nuclear Energy Institute.

⁶⁹ *"Congressional objectives expressed in the 1954 Act evince a legislative design to foster and encourage the development, use and control of atomic energy so as to make the maximum contribution to the general welfare and to increase the standard of living."*

Northern States Power Company v. the State of Minnesota, the Minnesota Pollution Control Agency, United States Court of Appeals, Eighth Circuit – 447 F.2d 1143

- 7) Provide the NRC with recommendations based on the evidence and testimony gathered in this docket. Such recommendations could be offered in advisory terms even if without legal effect.
- 8) Utilize the testimony, evidence, and conclusions in this docket to address pending concerns about misrepresentations in docket #7440, and the effect of those misrepresentations.
- 9) Utilize conclusions in this docket to analyze and address system stability and reliability under 30 V.S.A. 248(b)(3)⁷⁰ in docket 7440.
- 10) Utilize conclusions in this docket to address a balancing of the “General Good” in docket 7440.
- 11) Determine at the conclusion of this docket that no further action is necessary.

WRC Requests a Broadening of the Scope of Docket 7600

WRC now turns to the scope of this docket, and calls for a broadening of that scope. In making this request we hope to reduce confusion and accelerate final resolution of the matters related to the leak for which this docket was established, and to address the charges of misrepresentation now waiting for resolution in docket 7440.⁷¹ In making this request we are not seeking a broadening of investigation, but rather requesting that matters currently under investigation in docket 7440 be added to docket 7600.

WRC appreciates that voluminous information has become available in this docket, and recognizes an urgency to resolve issues brought forward in docket 7440 that have been exacerbated by this leak, and illuminated by the investigatory process. We argue it would be appropriate for the Board to modify the existing CPG to address those issues now rather than wait to address them in docket 7440, which cannot be released without legislative action. For example, resolution of corporate responsibilities and decommissioning requirements might better be handled here, especially given those two issues are clearly impacted by the leak and illuminated by the investigation in this docket, and due to the possibility that the legislature will deny the Board authority to rule in CPG extension case. Where a problem is identified or exacerbated by the leak, it would be better to impose a reasonable and immediate modification to the existing CPG so the State

⁷⁰ Please refer to footnote (4) above for an explanation of 30 V.S.A. 248(b)(3).

⁷¹ Those misrepresentations include statements made by two Entergy VY witnesses testifying at PSB technical hearings on two separate days, that there were no underground pipes containing radionuclides, as well as similar statements that may have been made to other Parties, Nuclear Safety Associates, the Public Oversight Panel, and the Vermont Legislature. The actual testimony and the effect of the various statements regarding underground pipes should be carefully reviewed to determine the extent of the inaccurate information, the intent behind the various statements made by Entergy VY, and the effect those statements have had in creating misunderstanding of the facts.

has the benefit of reduced risk and the improved conditions, rather than chance no remedy at all.

WRC understands that docket 7440 was closed following the filing of Reply Briefs on August 7, 2009. Since that time several leaks were discovered in underground pipes that carry radionuclides, and Entergy VY has confirmed that several Entergy VY witnesses misstated facts when they said there were no such pipes at the station. The matters of misrepresentation and the leak were originally separated by the Board, with the misrepresentation of facts to be reviewed in docket 7440, and the leak investigation to be handled in docket 7600. At the time it appeared that the misrepresentation and the leak were not related, and that the leak could not have been anticipated or prevented even if Entergy VY had been forthright about the existence of the pipes.

Several reports and documents that are important in this docket have been submitted into docket 7440, but to our understanding have not been formally entered into that record, nor have they been entered into docket 7600. Those documents include at least the Report of Investigation by Morgan, Lewis & Bockius LLP and the Public Oversight Panel's review of the NSA "Supplemental Report to the Comprehensive Reliability Assessment of the Vermont Yankee Facility." Separate investigations have been initiated by the Vermont Attorney General into the extent and role of misrepresentation in docket 7440, and the potential lack of compliance with state environmental laws brought forward in docket 7600.⁷² These documents should be entered into docket 7440, and into docket 7600 so they may be part of the record.

As a result of the investigation in this docket, there is now a nexus developing between the statements by Entergy VY that there were no underground pipes carrying radionuclides, and the leak for which this docket was established.

Vermont State Nuclear Engineer Uldis Vanags has testified the leak may have been ongoing for as long as two years prior to its discovery, which would place the start of the leak in November 2007.⁷³ The Supplemental Reliability Assessment conducted by Nuclear Safety Associates identified prior reports of ground subsidence (sink holes) above the leak site as early as July 2008.⁷⁴ This was during the period when the scope of the original reliability

⁷² The investigation by the Vermont Attorney General into compliance with environmental laws is discussed in ANR testimony, including the prefled written testimony by Chris Thompson, July 2, 2010, page 4

⁷³ Prefled written testimony of Uldis Vanags, July 2, 2010, page 5, line 6.

⁷⁴ DPS-UV-2 "Supplemental Report to the Comprehensive Reliability Assessment of the Vermont Yankee Facility" page 78

assessment was being defined, although NSA was not told about the sink holes when they established the scope of their inspection. The NSA Supplemental Reliability Assessment has identified three prior leaks in the same AOG system from 2004 to 2006, which the NSA team characterized as inaccessible,⁷⁵ and then offered inspection techniques that would help to identify such leaks. The Root Cause Evaluation Report stated “VY has had several floor drains in the power block become plugged in recent cycles,”⁷⁶ yet nothing appears to have been done to locate susceptible drains or drains that could not be monitored, actions which might have identified this leak sooner had a light been cast upon the deficiencies. And by May 20, 2008, just days prior to the passage of Act 189 and months prior to the engagement of NSA, Entergy VY had identified the inclusion of “an underground piping system that carries radionuclides” as “...the only aspect of the CRA for which he had not identified an existing NRC inspection.”⁷⁷ It is clear now that Entergy VY had ample opportunity to identify the buried pipes as a potential problem prior to the development of the scope of the NSA exam, and if those pipes had been inspected as part of the original reliability inspection the leakage might have been prevented or substantially reduced.

It is unlikely that the available evidence can conclusively prove that a thorough inspection in 2008 would have identified the leaks in time to prevent any harm, but there is now little doubt that a complete inspection at that time would have identified the leaks much sooner, and would have dramatically reduced the environmental harm and the associated additional costs of clean-up.

It appears that the once bright-line separating misrepresentation in docket 7440 from the harms alleged in docket 7600 has been blurred. It is also likely that Parties may wish to draw upon the relationship between the misrepresentation and the harms of the leak when addressing the third element of the title of this docket:

“...whether any penalties should be imposed on Entergy VY for any identified violations of Vermont statutes or Board orders related to the releases.”

WRC recognizes that docket 7440 is already very complicated, and that the Board is precluded from issuing a final order in that docket unless and until the Vermont state legislature votes to grant the needed authority. Since the Vermont legislature will not be in session until January 2011 there is little

⁷⁵ DPS-UV-2 “Supplemental Report to the Comprehensive Reliability Assessment of the Vermont Yankee Facility” page 15

⁷⁶ Entergy VY “Root Cause Evaluation Report” dated June 16, 2010, page 24

⁷⁷ Report of Investigation, February 22, 2010, page 15

need for an accelerated resolution in that docket. Further, WRC finds itself stretched to fully engage in a single docket, and would be disadvantaged if two similar and closely related dockets were concurrently active. We recognize that docket 7440 will certainly need to be fully reopened at some point if only to receive the corrections and additions already filed by Entergy VY, and to allow additional briefing based on the evidence and conclusions in docket 7600. We believe the process would be strengthened if the two dockets were handled in sequence, with docket 7600 being completed first. We also believe issues already raised in docket 7440 but connected to this leak might better be resolved here with modification to the existing CPG.

WRC Conclusion Regarding the Scope of Docket 7600

We ask that the relevant documents awaiting inclusion in docket 7440 be entered into docket 7600 and the scope of docket 7600 be broadened to include the investigation of misrepresentation by Entergy VY. We ask that a second round of discovery be scheduled for Entergy VY to respond to questions about the new documents, new leaks, and the extent of misrepresentation. We ask that a final ruling in this docket address the original topics outlined in the caption, and also address the extent of misrepresentation in docket 7440, as well as associated penalties for those misrepresentations if appropriate. Finally, we ask that the two dockets be handled in sequence, with docket 7600 concluding before the reopening of docket 7440.

Dated at Brattleboro, Vermont, this 20th day of August, 2010.

Windham Regional Commission

By: _____
L. Christopher Campany
Executive Director

cc: Service List